

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-120

JOHN DOE, SEX OFFENDER REGISTRY BOARD NO. 523878

vs.

SEX OFFENDER REGISTRY BOARD.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

In this consolidated appeal, the plaintiff, John Doe, appeals from a Superior Court judgment affirming the Sex Offender Registry Board's (board's) classification of Doe as a level three sex offender and from an order denying a postjudgment motion to remand the case to the board because Doe had recently turned fifty years old. Because we conclude that one of Doe's motions for expert funds was wrongly denied by the hearing examiner, we vacate the judgment and remand to the board for proceedings consistent with this memorandum and order.

Background. We summarize the relevant facts from the record. In 2012, Doe pleaded guilty to annoying and accosting a person of the opposite sex and threatening to commit a crime. In 2015, after another incident of a sexual nature, Doe pleaded guilty to one count of indecent assault and battery on a person

age fourteen or over, one count of threatening to commit a crime, and one count of intimidation of a witness, juror, police officer, or court official.¹ Subsequent to the indecent assault and battery charge, the board recommended that Doe register as a level three sex offender under G. L. c. 6, § 178K (2) (c).

Doe's request for a hearing was granted. Prior to the hearing, Doe submitted eight evidentiary motions to the hearing examiner via e-mail. Three of the motions were requests for funds for expert witnesses on Doe's age and risk of recidivism, on the limitations imposed by Doe's diabetes, and on Doe's mental health conditions. Doe requested funds for an expert witness on age because he was forty-eight years old at the time of the hearing and felt that his proximity to age fifty, which is considered a mitigating factor under 803 Code Mass. Regs. § 1.33(30) (2016) (advanced age), warranted an expert. Doe requested funds for an expert witness regarding his diabetes diagnosis in order to evaluate and explain its effect on his sexual libido and risk of recidivism. Doe also requested funds for an expert witness on his mental health due to his "long mental health history," including prescriptions for certain

¹ Doe was sentenced to concurrent eighteen-month sentences on the indecent assault and battery on a person fourteen or over and the intimidation charges. On the threatening to commit a crime charge, he received four years of probation.

mental health drugs and his posttraumatic stress disorder, schizophrenia, and bipolar disorder.

The hearing examiner ruled on most of the motions, including denying the expert funds regarding Doe's mental health,² but he left the motions on age and diabetes open. When Doe sought rulings on the two outstanding motions during the hearing, the hearing examiner replied that he did not remember the motions. The motions were nonetheless denied on the basis that the updated regulations "cover[ed]" age and physical condition. The hearing examiner classified Doe as a level three sex offender.

Doe appealed his classification to the Superior Court, where his motion for judgment on the pleadings was denied. Doe appealed that decision to this court. After the appeal was docketed, Doe requested and received a stay in order to file a motion for remand and a new hearing in the Superior Court. After a hearing in the Superior Court, Doe's motion to remand the matter to the board was denied. Doe appealed and the matter was consolidated with his appeal of the classification decision.

² The motion was denied on the basis that 803 Code Mass. Regs. § 1.33(1) (2016) (mental abnormality), and 803 Code Mass. Regs. § 1.33(35) (2016) (psychological or psychiatric profiles indicating risk to reoffend) already "specifically address" offenders with psychological issues.

Doe argues (1) that the hearing examiner erred by denying his requests for funds for three expert witnesses on age, mental health, and diabetes; (2) that the hearing examiner improperly considered another incident prior to his arrest as a sex offense; and (3) that remand was proper because Doe had turned fifty during the pendency of his appeal of his classification.

Discussion. A reviewing court may set aside or modify the board's decision if it was "(a) [i]n violation of constitutional provisions; or (b) [i]n excess of the statutory authority or jurisdiction of [the board]; or (c) [b]ased upon an error of law; or (d) [m]ade upon unlawful procedure; or (e) [u]nsupported by substantial evidence; or (f) [u]nwarranted by facts found by the court . . . where the court is constitutionally required to make independent findings of fact; or (g) [a]rbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law." G. L. c. 30A, § 14 (7). "In reviewing the hearing examiner's decision . . . we give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as the discretionary authority conferred upon it" (quotation and citation omitted). Doe, Sex Offender Registry Bd. No. 380316 v. Sex Offender Registry Bd., 473 Mass. 297, 301 n.5 (2015).

1. Requests for funds. The board has the discretion to grant an indigent petitioner's motion for expert witness funds.

See Doe, Sex Offender Registry Bd. No. 89230 v. Sex Offender Registry Bd., 452 Mass. 764, 774 (2008) (Doe No. 89230). In order to receive expert funds, the indigent sex offender must "identify and articulate the reason or reasons, connected to a condition or circumstance special to him, that he needs to retain a particular type of expert." Id. at 775. A general request for funds, without more, is not enough. Id. The Supreme Judicial Court has reversed a hearing examiner's denial of a similar motion for expert funds because the issue "(1) [was] particular to [Doe] -- the relationship of his long-standing bipolar disorder to the risk of recidivism, (2) [was] not a matter of common knowledge or experience, and (3) clearly had a bearing on Doe's classification." Id. at 775-776.

Here, we conclude that the denial of Doe's motion for expert funds related to his physical condition was improper.³ Doe's motion was detailed, at over two pages long, and was tailored to the specifics of Doe's condition. The motion stated that Doe had a diagnosis of "uncontrolled diabetes and

³ The hearing examiner did not err in denying Doe's motions for expert funds on the issues of his mental health and age. The motion on mental health failed to tie Doe's mental health history to a risk of recidivism or dangerousness. Doe's motion for an expert regarding his age was sufficiently addressed by the board's amended regulations on age, 803 Code Mass. Regs. § 1.33(30) (2016). See Doe, Sex Offender Registry Bd. No. 205614 v. Sex Offender Registry Bd., 466 Mass. 594, 609-610 (2013).

pancreatitis," which was supported in part by medical records.⁴ The affidavit quoted an article, written by a medical professional, providing that "[o]ne of the most common sexuality issues in patients with Type 2 diabetes is [a] decrease in libido, or loss of sex drive."

The impact of Doe's diabetes on his risk of recidivism is clearly not a matter of common knowledge or experience. While the hearing examiner explicitly gave Doe's diabetes no weight in his consideration of factor 31 (physical condition), 803 Code Mass. Regs. § 1.33(31) (2016), he could not reasonably make a knowledgeable determination on the issue. Indeed, factor 31 has been highlighted as a factor on which the board stands to benefit from an expert witness. See Doe No. 89230, 452 Mass. at 765. We see such a benefit here. We also note that the procedural arguments raised by the board are unavailing.⁵ As such, the denial of the motion constituted an abuse of discretion.

Conclusion. The judgment affirming the board's classification of Doe as a level three sex offender is vacated.

⁴ Doe's medical records reflect a diagnosis of "diabetes mellitus."

⁵ Contrary to the board's argument, the motion was provided in the record appendix. The motion was transmitted to the hearing examiner in the same e-mail as six other motions that were ruled upon.

The matter is remanded to the board for a new hearing consistent with this memorandum and order.⁶

So ordered.

By the Court (Green, C.J.,
Agnes & Desmond, JJ.⁷),

Joseph F. Stanton
Clerk

Entered: June 20, 2019.

⁶ Because we vacate his classification on that basis, we need not reach Doe's other arguments.

⁷ The panelists are listed in order of seniority.